88-1963

Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

BEN W. BEAZLEY,

Plaintiff-Petitioner

v.

MERRILL LYNCH FUTURES, INC.,
f/k/a MERRILL LYNCH COMMODITIES, INC.,

Defendant-Respondent

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Ben W. Beazley, Pro Se
Plaintiff-Petitioner

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## OUESTIONS PRESENTED

1. Is a judge's listing of a parent corporation as a liability interest on his financial disclosure documents because of his wife's margin account liability in excess of $10,000,a disqualification in a case involving the parent and a named subsidiary corporation, under 28 U.S.C.455, and the Code of Conduct waiver requirements of Canon 2 and 3, requiring recusal or a hearing before another judge as to recusal?

2. Is it a violation of due process to sanction a pro se Plaintiff by granting a Defendant's Rule 11 motion, without a hearing,or notice from the Court that cause for sanctions exist that require a response or hearing, especially when the "sanctionable" motion involves good faith complaints of lawyer/judge ethics conduct?

3. Do officers of the courts (attorneys) have a duty of factual candor to judges to disclose material adverse facts of attorney conduct, wherein house counsel for a corporation that failed to answer a complaint and summons, under oath alleged unintentional clerical oversight in the default, but failed to disclose that local defense counsel had obtained a copy of the complaint and notified defendant house counsel of the lawsuit on the third day after service was accomplished, and therefore was the false material impression a breach of judicial factual candor under FRCP 11 and a misrepresentation/fraud under FRCP 60 and this Court's 1944 decision in Hazel Atlas as to attorney ethics conduct?

4. Is it a violation of due process for the appeals court to screen cases in which notices of appeals have been filed by summarily holding the appeal is time-barred under FRAP 4 by denying Rule 59 tolling when a party filed a motion within 10 days of judgment, but inconsistently holding in similar cases that an appeal notice within 30days of judgment entry was ineffective because a post-judgment motion filed in the trial court within 10 days did toll the time?

Should a party who files a motion within 30 days of judgment to extend time to file notice of appeal,as a safeguard in connection with a pending Rule 59 motion be jurisdictionally screened if the trial court denys the extention motion,and the Rule 59 motion, in an order entered later than 30 days of the original judgment?

5. Is it a violation of due process, that a party's intangible property rights to a default judgment be denied because of a trial judge's manifest disregard of the default procedures of FRCP 55 & 60, by ex parte telephoning the local counsel of a defendant after the plaintiff properly requests default judgment, and thereafter issuing a "show cause" order which denied plaintiff a hearing,and lessened the defendant's burden under default in FRCP 60, and further denied plaintiff rights of fact-finding cross-examination as to the reasons for the default?

Is such procedure a violation of the Plaintiff's fifth and sixth amendment rights?

Should the judge VACATE his rulings if he issues an unrequested recusal after Plaintiff requests communication as to his "appearance of impropriety and the order doesn't give reasons for the recusal?

6. Is the conduct of the attorneys, law clerk, and judges in the district court, under the facts and procedures involved, such a departure from the accepted and usual course of judicial proceedings, that the appeals court per curiam affirmance without opinion, is sanctioning of the lower court's departure, calling for an exercise of this Court's power of supervision?

Was the appeals court affirmance a decision that conflicted with this Court's decision in Liljeberg as to judicial disqualification issues?

Is such procedures and conduct a violation of a party's constitutional rights to due process?

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## OPINIONS BELOW

The Eleventh Circuit Court of Appeals opinion sought to be reviewed was a per curiam Rule 36 non-published affirmance without written opinion decided on December 19, 1988, with rehearing denied on February 1, 1989. The Plaintiff had filed two different notice of appeals from different orders of the district court, and the appeals were consolidated. The Plaintiff-Petitioner sought review of all orders issued ih the district court. A "screening" panel of thè Eleventh Circuit partially screened the first appeal, but petitioner filed comprehensive briefs when the appeals were consolidated, as the panel assigned the case could have found "complete" jurisdiction. One of the issues herein involves the conflict between a screening panel and the final panel that hears the case.

## JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 19, 1988. The Eleventh Circuit denied Petitioner's Suggestion of Rehearing In Banc and Petition for Rehearing on February 1, 1989. Extention to petition granted through June 1,1989 by Justice Kennedy. This Court's jurisdiction is invoked under 28 U.S.C.1254.

## FEDERAL STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

F.R.App. P. 4

F.R.Civ. P. 4,11,55,59,60

Commodities Exchange Act 28 U.S.C.1331

28 U.S.C.455

Ethics Law 28 U.S.C App 301

United States Const. 5th Amend. due process

6th amend. & Art. III, VII

Code of Conduct for United States Judges

## STATEMENT OF THE CASE

Beazley filed a pro se complaint at the district court public filing counter in Atlanta against Merrill Lynch Futures,Inc. (Merrill Lynch) under the Commodities Exchange Act (CEA) and state common law.

The civil action asked for $13,000 in actual damages and $1,235,000,000 punitive damages. Defendant acknowledged notice and service on form 18-A after Beazley mailed the papers to the agent for service of process. The form 18-A was signed and mailed to Beazley from Defendant's house counsel, the litigation department of Merrill Lynch, Pierce, Fenner & Smith,Inc. (MLPF&S) in New York City, whereupon it was filed by Beazley with the clerk as a return of service. Merrill Lynch failed to answer timely, and Beazley waited for another 20 days without any answer or contact. Finally, Beazley complied with FRCP 55 and by affidavit requested default

judgment. The clerk submitted the request to the "permanent" elbow law clerk of the judge assigned the case, who had other cases against Merrill Lynch and knew the local defense counsel of Defendant. Rather than issue the default judgment as the Court normally does, the law clerk did ex parte telephone the local counsel, a high profile member of the Federal Bar Association. That day a "show cause" order was signed by the judge and mailed to Beazley and local counsel, although Beazley was not notified of the ex parte call.

Local counsel filed a "Motion to Open Default" with the affidavit of a MLPF&S employee-attorney alleging excuses of "unintentional clerical oversight" in defendant's default saying he was traveling all but the first five days in which to have answered. He claimed his secretary "misfiled" the complaint, and that he had called Beazley's answering machine during

the time to answer. Beazley responded to the out-of-time motion, requested a hearing, and denied that he had been called during the time to answer,but only after the Court had "tipped off" local counsel of the default request. Beazley suggested phone records of the completed calls to his phone machine was evidence house counsel could best prove as to when the calls were made.

The court would not conduct a hearing under FRCP 55 & 60 which would have given Beazley cross-examination of those involved in the default. Instead, the law clerk drafted an order that GRANTED the motion to open default by accepting house counsels contentions about failing to answer.

There is evidence that the judge then "signed off" on the order because it had photocopied onto it a yellow post-it note from the law clerk to the judge concerning the order. Beazley requested communication with the judge regarding an appearance of

impropriety. Rather than respond, the judge immediately issued his recusal order that was not requested. The order gave no reason for the recusal, but directed the case be reassigned. The prior orders of the judge were NOT VACATED.

Beazley immediately filed a stay motion before the second judge so an inquiry could be made as to the partiality regaring the prior default procedure. The second judge called the parties to a hearing, but did not tell the parties that he had disclosed a liability in excess of $10,000 of his wife's in a margin account with the parent corporation of defendant, on his financial disclosure forms. The second judge harshly DENIED Beazley a stay,and under the strict comity custom, told Beazley that the prior judge's default opening was "law of the case", but Beazley could file new motions. The second judge ordered that a certificate of interested persons be filed forthwith.

The second judge extended discovery and required the case move along on the normal schedule, as if no problem existed. Beazley renewed his default motions before the second judge, but complied otherwise with the case management papers the court had required. The second judge called a "Rule 16" conference but began by casually mentioning that his wife had an account with MLPF&S, but that it did not matter one "IOTA". He failed to mention the margin account liability in an amount that required it be disclosed on the disclosure documents. There was no mention of the waiver requirments of disqualification law or the written waiver mandates of the Code of Conduct. Unaware and intimidated, Beazley was in no position to object. The judge said that he was busy with other matters and would not rule on the pending motions, and would extend discovery if the motions were not decided before expiration.

Beazley filed a formal request for production of the phone records. A week before the phone records production deadline, the Court harshly denied Beazley's motions, implying him an ambusher and sandbagger. The judge ordered the case for immediate trial in less than 30 days, ruled that discovery time had expired, and ordered Beazley comply with Defendant's discovery which Beazley was resisting as to not waive the default issues. Defendant would not produce the phone records. Facing trial without merit discovery, and new sanction motions for resisting discovery, Beazley announced a settlement at a pre-trial conference the judge called, but a dismissal was not stipulated. The judge said he had forgot about discoverty extention, and would await the settlement paperwork. Instead, the judge dismissed the case that day, and called another conference when Beazley inquired about

the dismissal. The judge indicated that Beazley could move the Court to set aside the dismissal, if he felt mistakes had been made. Beazley filed a motion suggested by the judge, but not within the 30 final order time but expressly within the Rule 59 10 day requirement so as to poll appeal time under FRAP 4. s an extra precaution, Beazley filed a FRAP 4 motion to extend appeal time, before the 30 day expiration.

The Court not only denied Beazley relief, it denied the appeal extention motion as improperly brought. Beazley moved for reconsideration and subsequently filed a notice of appeal.

The Eleventh Circuit's policy of jurisdictional screening, held that Beazley's appeal was untimely as to the dismissal order, but timely as to the order denying the set aside 10 day motion. Beazley did not get the Rule 59 toll, and the Court said jurisdiction could not "carry with

the case". Beazley's timely request in district court to extend appeal time until after the set aside motion was decided was not reviewed by the screening panel. Faced with the deferential standard of review after being screened, Beazley thought of one final chance at discovering the truth, before the dismissal order became out of the one year FRCP 60 term of court.

Given the modern computer docketing of large corporations, it was virtually impossible for Merrill Lynch to have failed to answer through unintentional clerical oversight. Beazley noticed an unusual number of staple holes in his original complaint in the record, as if it had been unstapled and restapled for copying. Beazley remembered that receipts are kept when copies of a complaint are purchased from the clerk, so Beazley obtained all the receipts issued by the clerk during the time his complaint could have been

answered. Beazley made the shocking discovery that local counsel had bought a copy of Beazley's original complaint and file,three days after the New York litigation department of MLPF&S had signed the acknowledgment of service. Beazley confronted local counsel saying that he knew more had happened that defendant has said. Beazley was asked to leave their offices, and Beazley showed the judges deputy clerk the receipts and requested communication with the Court regarding'the defendant's misrepresentation and lack of factual candor. Upon seeing the receipt, the judge said he could only act on a written motion. Beazley filed a FRCP 60 misrepresentation and fraud motion the day before the one year term of court for Rule 60 relief was about to expire. Beazley moved the appeals court to stay the appeal until the fraud motion was decided. The judge issued an order setting Beazley's motion for hearing.

The judge,in the order,told defendant that Beazley had found the receipt. Beazley did not receive the response to the motion until the morning of the hearing, and therefore Beazley requested that he be allowed to go foward without opening defendant's reply so that Beazley could show that he thought of all possibilities as to why local counsel would have purchased his complaint from the clerk. Beazley correctly anticipated that local counsel would say that they read the county legal paper's publication of "new cases filed". Nevertheless, there was some reason a copy was obtained. Local counsel gave an affidavit in defendant's response wherein he stated that he did in fact call house counsel about Beazley's case on the fifth day of the five days that house counsel had already swore he was not traveling. Despite local counsel's back-up call to house counsel as a procedural safeguard against default, local

counsel was not retained to answer, nor was "service of process" mentioned. The judge found no inconsistency in house counsel's original affidavit and the new affidavit given by local counsel after Beazley had found their receipt of his complaint. Beazley informed the court that he wished to reply by brief to their response just received to his relief motion. The court ruled against Beazley without picking up the already filed reply from the clerk, so Beazley moved for reconsideration.

It was then that Beazley discovered for the first time about the margin account liability on the judge's finacial disclosure documents, because the local legal paper published a summary of the financial interests required by the law to be listed. After verifying the information and researching 28. U.S.C 455, Beazley immediately filed a handwritten recusal motion. At the same time, defendant was filing a

Rule 11 sanction motion against Beazley, wherein they requested a hearing on the sanction motion with the judge. The judge granted Beazley's reconsideration motion, but denied Rule 60 fraud relief.

The judge denied Beazley's recusal motion by holding that a margin account of over $10,000 listed on financial disclosure documents, was not a financial interest requiring recusal/disqualification, but was merely a debt like a charge account. In a clearly erroneous finding of fact, the judge held that he had told Beazley about the margin account, when the transcript shows he just said account.

Finally, the judge sanctioned Beazley $2500 for filing the motions, holding that they were not objectively well founded in law and in fact, after reasonable inquiry and investigation. Beazley filed a response for the record on appeal, because the judge threatened contempt

fines if further motions were filed.

Beazley had not responded to the sanction motion because of the pending reconsideration motion to consider his reply to defendant's response to Beazley's Rule 60 misrepresentation/fraud motion. The court sanctioned Beazley in the same order that finally denied his "sanctionable" fraud motion. Beazley was not given any notice of the court's inclination to sanction him so as to permit Beazley to prepare a response and request a hearing so as to answer questions. The recusal motion was pending also, and Beazley did not want to waive disqualification issues by responding until it was necessary to respond, because Beazley may have prevailed on recusal,or reconsideration that was granted.

Beazley filed a second notice of appeal, and the Eleventh Circuit upon motion, consolidated the two appeals. After briefing, oral argument was granted.

Before oral argument, the Supreme Court of the United States decided Liljeberg, which Beazley cited during argument. The panel denied Beazley's attempt to file a brief of supplemental authority as a result of Liljeberg. The appeals court issued a Rule 36 non-published affirmance per curiam without opinion. Beazley's petition for rehearing of the December 19, 1988 affirmance was denied on February 1, 1989.

EXISTENCE OF JURISDICTION ORIGINALLY

The federal jurisdiction in the district court was statutorily authorized under the Commodities Exchange Act, 28 U.S.C.1331

Beazley had a choice of dispute resolution forums including arbitration, the reparations procedures of the Commodity Futures Trading Commision, and Federal Court private cause of action.

Beazley had rejected arbitration when his account was opened, so there was not any binding arbitration. (McMahon/Rodriguez)

## REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari in this case considering that there are any number of special and important reasons therefor, one of which is this Court's power of supervision over a case that has departed from the accepted and usual course of judicial proceedings.

1. The judge that was reassigned the case was disqualified per se and should have never accepted the assignment. He had been listing MLPF&S on his disclosure forms for a number of years under the Ethics Law,28 U.S.C. App.301. This was because his wife had a large margin account liability which was required to be listed if it exceeded $10,000.

Notwithstanding, he set a hearing on Beazley's stay motion and made substantive rulings. This was without disclosing the interest to Beazley or getting a waiver that is required to be in writing and

signed outside the presence of the judge under the Code of Conduct. Congress enacted 28 U.S.C.455 in the post-Watergate era of ethics examination. Some financial interests were per se disqualifications. Others were waivable after full disclosure of the interest. The Code of Conduct includes a form for obtaining an "informed" waiver. When the judge held the first hearing, he seemed very concerned that the Certificate of Interested Persons had not been filed by Merrill Lynch. After it was filed, and listed MLPF&S as a parent of defendant, and this was the same MLPF&S listed on the judges ethics forms, then recusal should have been automatic. The same corporation on both disclosure forms and the Certificate of Interested Persons, signals recusal/ disqualification. The judge did give Beazley a belated partial disclosure but this was the very thing the statutes were

enacted to prevent. In addition, the judge only told Beazley of an account when his disclosures indicated a margin account. Yet, he denied recusal by holding that he told Beazley of the margin account. This is evidence that the judge may not have understood the extreme difference between a regular stock brokerage account and a margin account that has equitable features because the broker lends money to a customer to buy stock collateralized by the 50% cash payment the customer usually puts up, and the broker usually keeps the stock in it's own name and counts it as its assets.

The ethics /disqualification laws do not limit disqualifications to parties that the judge owns stock in, but defines a financial interests in <u>para materia</u> with the disclosure document rules as to large liabilities. The October market crash allowed brokers to liquidate customers accounts and not other customers at the

whim of the brokerage corporation.

Another reason for disqualification is that MLPF&S house counsel acted as house counsel for the subsidiary defendant. Once Beazley discovered that this MLPF&S had not been candid in its default excuses, then the judge was,at that point,ruling on the conduct of the actual corporation he had listed on his disclosures.

Finally, Liljeberg v. Health Services Acquisition Corp., 198 S.Ct. 2194(1988) was held by this Court to show that Beazley's post-judgment recusal motion filed when the problem was discovered, was not such a bizare effort by Beazley, as the Courts below seem to have considered. It is as if the Eleventh Circuit when first cited Liljeberg at oral arugument had already decided Beazley's case and were not going to follow Liljeberg, even though the Supreme Court and the Fifth Circuit heard the case a couple of times before deciding. Federal courts are not following Liljeberg.

Liljeberg requires VACATUR of a judges orders if impartiality can be reasonably questioned, regardless of what the judge himself may feel. This Court approved the procedure of having another judge decide a disqualification motion as was done by the Fifth Circuit in Liljeberg.

Another judge should always hear such motions because at the end of the disclosure form filed by a judge, he signs a statment to the effect that he has not taken cases where he is disqualified under the statutes. How could a judge impartially decide a recusal motion where he has already signed a statement that he will not have to recuse? The decision should be de novo by another judge, without any interests whatsoever.

Beazley was not given any type of hearing on the recusal motion, and the judge considered the motion in sanctioning Beazley. Recusal motions are best decided by disinterested uninvolved judges.

2. Sanctioning Beazley for filing a fraud motion as a result of house counsels documented misrepresentations was not warranted. Rule 11 was not intended to chill criticism of attorney conduct, or judicial conduct. Beazley's case is one that should have required a hearing, although hearings are not required in all Rule 11 cases. It is suggested that what should be required in Rule 11 cases is that the judge find "probable cause" to consider a sanction. Once the party is informed of the Court's inclination, then a response and /or requests for a hearing could be fashioned. The delicate sensitivities in Rule 11 lend themselves to the question/answer hearing process. The judge sanctioned Beazley because he assumed the sanctionable motion was filed without reasonable inquiry, without considering that the one year term was about to expire. Of course, Beazley's

motion was not based upon conclusory allegations, for Beazley had obtained evidence to make a prima facie showing, which would have allowed his default inquiry to be properly examined as the law required anyway. Unfortunately for Beazley,his case contained judicial conduct that was not a fair fact finding process,or a fair application of the law.

Beazley's Rule 60 fraud motion was in good faith because he had consistently questioned the reasons given by defendant in failing to answer, and was denied the opportunity by the Court. Some circuits have considered the good faith "defense" to Rule 11. The Seventh Circuit has held in securities cases that to award attorney fees in rule 11 a showing of subjective bad faith was required. Suslick v Rothchild Securities Corp.,741 F.2d 1000(7th Cir.1984) Gieringer v. Silverman, 731 F.2d1272 (1984) The Supreme Court could accept Beazley's case for its first Rule 11 construction.

3. The Supreme Court long ago held that attorneys would be held to a higher standard,and relief should be granted a party who was prejudiced by attorney involvement in misrepresentation to a court. In the landmark case of Hazel Atlas Glass v Hartford Empire Co., 322 U.S.238, 64 S.Ct. 997, 88L.Ed. 1250 (1944) Justice Hugo Black's opinion vacated a judgment obtained by fraud when an attorney ghostwrote a trade journal article as a disinterested expert relied upon in the trial. Most Courts when confronted with information-withholding and inconsistent testimony grant relief when attorney conduct is involved, as long as the motion is filed within a year of the judgment under the term rule of FRCP 60, although fraud upon the Court can be heard at any time.

The is a trend to find a duty of factual and legal candor as a result of Rule 11 pleading requirements, for failing

to disclose. The Eleventh Circuit embraced a duty of factual candor and held it was a breach of Rule 11 in failing to disclose. Blackwell v. Dept. of Offender Rehabilitation, 807 F.2d 914, 915-16 (11th Cir.1986) The new ABA Rule 3.3 eliminates attorney-client confidentiality as a reason for non-disclosure. The Supreme Court could adopt Rule 11 nationwide as requiring a duty of candor in court rather than the old-style false impression nondisclosure.

The problem in Beazley's case is that the judge and law clerk gave the defaulting defendant the opportunity of nondisclosure in the ex parte call and the show cause approach. It must be remembered that when the law clerk informed local counsel of Beazley's default request, local counsel had already obtained Beazley's complaint from the clerk of court, and already had called house counsel about the case. This was the same law clerk who wrote

the order opening default with the post-it note attached. This was a five-year clerk.

4. After Beazley filed the first notice of appeal, the Eleventh Circuit staff attorneys office screened the case and a screening panel partially screened the appeal holding that the motion to set aside the dismissal was timely but not the dismissal itself. Beazley had specifically filed his post dismissal motion within 10 days of the judgment of dismissal. He filed a appeal extention motion within 30 days of the dismissal. Yet the appeals court screened his case against this Court's holding in Forman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222(1962) Recently in an Eleventh Circuit case, this Supreme Court held a 10 day post judgment motion tolled appeal time and negated an earlier appeal in Osterneck v. Ernst & Whinney, 109 S. Ct. 987 (1989).

The policy reasons outlined in Osterneck applied in this case herein. Justice Kennedy reasoned that the appellate court should have the benefit of a complete record after the district court has had the opportunity to correct mistakes.

Given the highest per capita caseload of any circuit, it could be argued that the staff is tempted to screen a case under any possible catch-22 circumstances. Osterneck was untimely filed by appealing too early after a 10 day motion, and Beazley who likewise had a 10 day motion was too late . Beazley even lost a safeguard appeal extention he timely made.

Beazley's approach of trying to get the district court to correct errors is the better policy under Rule 59 and the judicial economy of avoiding appeals.

This is the policy of Osterneck.

5. When the first judge's law clerk telephoned local counsel, this ex parte contact was a violation of the Code of Conduct as to impartiality. It should not be assumed that the law clerk made the contact absent instruction from the judge. The judge "got rid" of Beazley with the unrequested recusal giving no reasons, and not vacating the default opening order. Under Liljeberg, if the judges impartiality can be questioned, and there is an appearance of injustice, then this judges orders should have been vacated.

The show cause approach was a manifest disregard for the default law and a violation of due process in disallowing Beazley a fair chance at fact finding at a hearing, and not requiring Defendant to meet the higher standard of Rule 60 relief in setting aside a default judgment that Beazley was entitled to at that time.

6. Rarely does a case develop as this case did, because corporate defendants rarely unintentionally default. Beazley believes that it is possible that the reason an answer was not timely served and filed is because house counsel may not have known about the acknowledgment because Beazley mailed the required two form 18-A's leaving one still in the file when it was assigned to house counsel after the MLPF&S litigation clerk signed the one form 18-A. Likewise the stamped self addressed envelop included was not used in mailing the form back to Plaintiff. The statute of limitations was expiring and defendant may have been waiting to see if Beazley would suffer the 120 day dismissal if a process server was not used. There was no proof of service in the clerk's file when local counsel purchased. This assumes house counsel thought the decision to acknowledge was his yet to make.

Beazley gave Merrill Lynch a self imposed 20 day courtesy extention before requesting default judgment. It was out of time for a Motion to Open Default to be filed, and the only reason it happened is that the Court called up local counsel because the court knows who represented defendant. How about all the defendants who suffer default judgment when the court does not know who represents them if anyone? The proper procedure was to grant some type of default judgment and require defendant to meet the burden under FRCP 60 to have the judgment set aside. Add to this the post it note , the recusal, the financial interest issues of the second judge, and the lack of candor as to the default, the sanction of Beazley, the appeal screening,--- the result is a departure from the usual course of judicial proceedings calling for this Court's supervision. Beazley did not cause these

problems. Beazley simply wanted his case to follow the law under the status defendant put it in, but the Court did not want to resolve the genuine issue of fact concerning the default,under the fair application of the law of defaults. Without impartial judges and candid attorneys, any chance at equal justice for a pro se Plaintiff can only be achieved under this Court's supervision. In Peralta v. Heights Medical Center, Inc.108 S.Ct. 896 (1988) this Court reviewd the special considerations as to default judgments under state law, yet this court recognized the validity of default judgments that comply with due process, such as notifying the defaulter that a judgment has been issued in time to respond. Although a decision on the merits is desirable, the recent trend is that a party that failed to answer must show what backup procedures were in place and offer acceptable excuses as to how the minimum

procedural safeguards may have failed. A case of proper application of default law was Park Corp. v. Lexington Insurance Co.812 F.2d 892 (4th Cir. 1987) wherein a mail receipt was signed by a non-attorney to accomplish service. Then a default judgment was granted under Rule 55, and the court held that the house counsel must show back-up procedures and denied the defendant relief. This is the current law in the Eleventh Circuit as held in Gibbs v. Air Canada, 810 F.2d 1529 (11th Cir) holding that the test is "minimum procedural safeguards" and not "willfullness" as the trial court applied in this case below herein.

Actually, Beazley has even shown a degree of willfullness in that house counsel did not retain local counsel to answer on the last day before leaving town for the the remainder of the answer time. These issues of fact could have been decided by the judge after a hearing.

## CONCLUSION

Merrill Lynch defaults and the judicial system has applicable rules for such a case status. But if those court officers do not go by the rules, then justice is not served or accomplished.

Liljeberg and 28 U.S.C 455 per se disqualifications, along with codes of conduct show that Beazley was not the party in violation of Rule 11, because the party that is critical of lack of candor should not be sanctioned as opposed to the counsel that breached the duty.

A multifacited case as Beazley's only surfaces about every 50 years, although tribunals are misled everyday. Day to day justice can be better achieved by certiorari being granted herein, and this Court making candor by attorneys binding in all federal courts. The judicial branch of goverment should set the ethics example.

Ben W. Beagle

AFFIDAVIT OF SERVICE

I, Ben W. Beazley, do hereby state ,after being duly sworn that I have this day served counsel of record for Defendant respondant with this petition for Certiorari by mailing first class with adequate postage thereon by depositing same in U.S. Postal Service mailbox addressed as follows.

Rogers & Hardin
Paul W. Stivers, Esq.
2700 Cain Tower
229 Peachtree St. N.E.
Atlanta GA 30303

I have done this in compliance with the Rules of the U.S.Supreme Court Rule 28.3 Et. Seq.

This 31 day of May, 1989

Ben W. Beazley

Ben W. Beazley
Petitioner Pro Se

Sworn to and subscribed
before me this 31 day of May, 1989.

Notary Public

Notary Public, DeKalb County, Georgia
My Commission Expires June 9, 1992